IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VALLEY FORGE LIFE INSURANCE COMPANY	:	
v.	:	Civil Action No. DKC 2003-1809
SHELLY LIEBOWITZ	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this insurance dispute are (1) the motion of Defendant Shelly Liebowitz for partial summary judgment, and (2) the cross-motion of Plaintiff Valley Forge Life Insurance Company ("Valley Forge") for summary judgment. The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, the court denies Valley Forge's motion and grants Ms. Liebowitz's motion.

I. Background

The following facts are undisputed. On July 16, 2000, Ms. Liebowitz's husband, Bruce Liebowitz, now deceased, signed an application for a $2,000,000 life insurance policy to be issued by Valley Forge. The application was filled out by the decedent's father, Howard Liebowitz, an insurance agent who sold policies on behalf of several insurance companies including Valley Forge.

In response to question 9b of the application, which asked whether the applicant "[i]n the last two years traveled or resided or intends to travel or reside outside the USA," Howard Liebowitz checked "No." The decedent signed the application. In October 2000, Valley Forge issued the policy, which became effective on November 1, 2000. On October 16, 2000, the decedent paid his first premium.

Contrary to the answer provided to question 9b on his policy application, the decedent had traveled extensively outside the United States in the prior two years, and in fact lived in Spain until January of 2000, when he moved to Maryland. The decedent married Ms. Liebowitz, then a resident of Israel, in February of 1999, and the two had a child in November of 1999. Ms. Liebowitz asserts, and Valley Forge does not contest, that they then decided together to move to Maryland; Ms. Liebowitz, however, never actually moved from Israel to Maryland. The decedent also continued to travel extensively after applying for his insurance policy.

On September 5, 2002, Bruce Liebowitz died of esophageal cancer. Soon thereafter Ms. Liebowitz submitted a claim for death benefits under the policy. Valley Forge denied the claim on the basis of the misrepresentation in question 9b of the policy application.

On June 18, 2003, Valley Forge filed a preemptive complaint with this court requesting that the court (1) issue a declaratory judgment that the policy was never in effect, (2) restrain Ms. Liebowitz from instituting any action against Valley Forge for recovery under the policy, and (3) grant attorney's fees and other restitution as the court deems appropriate. Paper no. 1. On September 30, 2003, Ms. Liebowitz filed both an answer and a counterclaim, in which she (1) requested the converse declaratory judgment; (2) asserted breach of contract, negligence, and bad faith; and (3) requested full payment of the policy, plus interest, and damages for foreseeable emotional distress, extracontractual damages, punitive damages, fees and costs. Paper no. 9.

II. Standard of Review

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate.

Anderson, 477 U.S. at 250; *see also Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1987). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Catawba Indian Tribe of South Carolina v. State of S.C.*, 978 F.2d 1334, 1339 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *See U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is that party's responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324.

However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 (4th Cir.), *cert. denied*, 522 U.S. 810 (1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

When faced with cross-motions for summary judgment, as in this case, the court must consider "each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (internal quotation omitted). *See also havePower, LLC v. Gen. Electric Co.*, 256 F.Supp.2d 402, 406 (D.Md. 2003) (citing 10A Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure § 2720 (3d ed. 1983)). The court reviews each motion under the familiar standard for summary judgment, *supra*. The court must deny both motions if it finds there is a genuine issue of material fact, "[b]ut if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A Federal Practice & Procedure §2720.

III. Analysis

Ms. Liebowitz moves for partial summary judgment, seeking judgment on her breach of contract and declaratory relief claims. She argues that (1) the decedent's failure to disclose his foreign travel was immaterial to Valley Forge's decision to issue the policy, and (2) Valley Forge is estopped from denying payment on the policy because it issued the policy despite having full knowledge, through its agent, Howard Liebowitz, of the decedent's travel history and travel plans.

In its cross-motion for summary judgment, Valley Forge argues that (1) it is entitled to rescind the policy based on the decedent's misrepresentation in question 9b because the misrepresentation was, in fact, material, in that, had it known of the decedent's travel history and plans, it would not have issued the policy as it did; (2) in denying any intention to travel outside the United States and then doing so after submitting his application for coverage, the decedent failed to fulfill an express condition precedent to coverage; and (3) Howard Liebowitz's knowledge of the decedent's travel history and intentions cannot be imputed to Valley Forge because he was the decedent's broker, and therefore not Valley Forge's agent.

A. Whether Howard Liebowitz's Knowledge of the Decedent's Travel Is Imputed to Valley Forge

Under Maryland law, it is well settled that "an insurance company which issues a policy and collects the premium thereon, with actual or imputed knowledge that warranties contained in it are contrary to the real facts, will not be permitted to defeat recovery by the insured on the ground that the conditions thus stipulated did not exist." *Allstate Ins. Co. v. Reliance Ins. Co.,* 786 A.2d 27, 32 (Md.Ct.Spec.App. 2001) (quoting *Commonwealth Cas. Co. v. Arrigo,* 154 A. 136 (1931)), *cert. denied,* 796 A.2d 695 (Md. 2002).[1]

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[1] Historically, there was a distinction between a warranty and a representation. Maryland has abrogated the distinction by statute. MD. CODE ANN., INS. § 12-207(a) (2003). A predecessor statute was described in *Monahan v. Mutual Life Ins. Co.,* 63 A. 211, 212 (Md. 1906):

> There is a broad and material distinction between a warranty and a representation. A representation is not a part of the contract, but is collateral thereto, while a warranty is a part of the contract. In consequence of this, while the falsity of a representation is not a ground for avoiding the contract unless material to the risk, a warranty as to any fact will preclude any inquiry as to the materiality of that fact. 16 Am. & Eng. Ency. L. 932. The legislation of many of the states, including Maryland, has modified the harsh rule respecting warranties in this class of contracts, and has swept away a group of merely technical objections to a recovery on life insurance policies[] (Md. [C]as. Co. v. Gehrmann, 96 Md. 6[34], 54 Atl. 678), by declaring that, "whenever the application for a policy of

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Ms. Liebowitz contends that the decedent's father, Howard Liebowitz, was the agent on the life insurance policy; that the decedent's father had full knowledge of his son's travel history; that, as Valley Forge's agent, that knowledge should be imputed to Valley Forge; and that Valley Forge should therefore be barred from refusing the claim even if the misrepresentation is found to be material. Paper no. 31, at 22. It is undisputed that Howard Liebowitz knew of his son's travel history and future travel plans, that his son came to him for help in procuring life insurance, and that he recommended a Valley Forge policy and filled out his son's application. Valley Forge argues, however, that Howard Liebowitz was not Valley Forge's agent, but the decedent's broker, so that no agency relationship existed between him and Valley Forge, rendering improper any imputation of his knowledge to Valley Forge.

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> life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk." Section 196, art. 23, Code Pub. Gen. Laws 1904.

"The burden of proof rests upon the person alleging the agency to show not only its existence but its nature and extent." *Med. Mut. Liab. Ins. Soc. of Maryland v. Mut. Fire, Marine & Inland Ins. Co.,* 379 A.2d 739, 742 (Md.Ct.Spec.App. 1977). Ordinarily, "[t]he existence of an agency relationship is a question of fact which must be submitted to the factfinder if any legally sufficient evidence tending to prove the agency is offered," even if a movant "present[s] legally sufficient evidence of an agency relationship." *Essex Ins. Co. v. Hoffman,* 168 F.Supp.2d 547, 557 (D.Md. 2001) (quoting *Faya v. Almaraz,* 620 A.2d 327, 339-40 (Md. 1993)). The existence of an agency relationship may be decided on summary judgment, however, either when "the party alleging the existence of a principal-agent relationship fails to produce sufficient evidence to allow a reasonable fact finder to conclude that such a relationship exists," *Green v. H&R Block, Inc.,* 735 A.2d 1039, 1048 (Md. 1999) (citing cases), or when "there is no conflict in the evidence relating to the question and but one inference can be drawn therefrom." *Globe Indem. Co. v. Victill Corp.,* 119 A.2d 423, 429 (Md. 1956).

Whether an agency in fact has been created is determined by the relations of the parties as they exist under their agreements or acts, and the question ultimately is one of

intention. *Am. Cas. Co. of Reading, Pa. v. Ricas,* 22 A.2d 484, 487 (Md. 1941); *see Med. Mut.,* 379 A.2d at 742-43 ("The relation of principal and agent does not necessarily depend upon an express appointment and acceptance thereof, but it may by implied from the words and conduct of the parties and the circumstances.") (quoting *Heslop v. Dieudonne,* 120 A.2d 669 (Md. 1956)). To determine whether an agency relationship exists, Maryland law asks whether the agent (1) is subject to the principal's control; (2) has a duty to act primarily for the benefit of the principal; and (3) has the power to alter the legal relations of the principal. *Essex,* 168 F.Supp.2d at 557 (quoting *United Capitol Ins. Co. v. Kapiloff,* 155 F.3d 488, 498 (4th Cir. 1998)). These factors are "considerations," however, and are not determinative; the issue is instead dependent on the particular circumstances of each case. *Essex,* 168 F.Supp.2d at 557 (citing *Green,* 735 A.2d at 1049).

Insurance agents are typically construed as legal agents of the insurers for whom they solicit policies:

> In 26 Amer. & Eng. Annotated Cases, 850, a large number of cases are cited in support of the proposition: "An agent of the insurer whose duty it is to take or solicit applications for insurance, to forward such applications to the insurer for acceptance, to deliver the policy and to collect the premium, has frequently been held such an agent that knowledge, as to matters

> affecting the risk or conditions of the policy, acquired by him while performing such duties will be imputed to the insurer."

Goebel v. German-Am. Ins. Co. of Pa., 96 A. 627, 630 (Md. 1916). A distinction has long been drawn, however, between insurance agents and insurance brokers for the purpose of determining agency. In 1941, the *Ricas* court distinguished the two:

> Authorities everywhere agree that an insurance agent, so far as the insurer is concerned, is a person expressly or impliedly authorized to represent it in dealing with third parties in matters relating to insurance, and an insurance solicitor, or broker, is one who acts as a middle man between the assured and the insurer, and who solicits insurance from the public under no employment from any special company, but having secured an order, either places the insurance with a company selected by the assured, or in the absence of any selection by him, then with a company selected by the broker. Ordinarily, the relation between the insured and the broker is that between principal and agent. An insurance broker is ordinarily employed by a person seeking insurance, and when so employed, is to be distinguished from ordinary insurance agent, who is employed by insurance companies to solicit and write insurance by, and in the company.
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> *. . .* where one employs another to procure insurance, the person so employed is the agent of the insured, and not of the insurer, in all matters connected with such procurement. This rule applies to cases where the insurance has been effected through the medium of a broker, although the broker may have solicited the insured to take out the policy. Such solicitations

> only cannot constitute the broker the agent of the insurer, so as to bind the latter for the acts, declarations, or omissions of the former.

22 A.2d at 487 (citations omitted). In *Ricas,* an "independent solicitor" placed the appellee's applications for two automobile insurance policies with another company which in turn placed the applications with two insurers; one of the insurers had not yet approved the application when the appellee was involved in an auto accident. The solicitor, who placed his business through agents of various companies but had no contract of employment with any of them, and who at one time had a solicitor's license but at the time of the application in controversy had no license at all, was held not to be an agent for an insurer but a broker for the insured. The court contrasted its finding with the earlier case *Travelers' Ins. Co. v. Melman,* 128 A. 125 (Md. 1925), where an insurance agent who was an employee of the insurer was found to be an agent of that insurer; his assurance to the insured that the latter was covered despite not yet having paid her premium was therefore imputed to the appellant insurer. The *Ricas* court concluded that, unlike in *Melman*, "[h]ere [the agent] was not employed by the appellant, and did not solicit the policy for the appellant, or for any particular company. The mere fact that he submitted an application to an

agent of the appellant, in no wise made him its agent, actual or ostensible." 22 A.2d at 487.

Thus, an "insurance agent" is not necessarily an agent in the legal sense. "Whether a person is a broker or an agent is determined not by what he is called but by what he does." *Med. Mut.,* 379 A.2d at 743*; see, e.g., Sadler v. Loomis Co.,* 776 A.2d 25, 37 (Md. 2001) ("Although Loomis is sometimes referred to here as an insurance agency, it is clear that Loomis functioned as a broker.").

The case at bar seems at first blush to be a closer question than either *Ricas* or *Melman,* but the uncontroverted facts nonetheless establish as a matter of law that Howard Liebowitz was Valley Forge's agent for the purposes of this motion. At the time the application was completed and submitted, Maryland law separately defined the terms "agent" and "broker." *See* MD. CODE ANN., INS. § 1-101(c)(1),(i) (2000) (deleted 2001).[2] An "agent" was "a person that, for compensation, solicits, procures, negotiates, or makes insurance contracts . . . .", § 1-101(c)(1) (2000), whereas a "broker" was a person that, for compensation, solicits, procures, or negotiates insurance

[2] In 2001, the terms "agent" and "broker" were replaced with the single term "insurance provider" throughout Maryland's Insurance code. *See* 2001 Md. Laws ch. 731, §§ 1, 2.

contracts . . . (1) for insureds or prospective insureds other than the broker; and (2) not for an insurer or agent." § 1-101(i) (2000). In order to practice, a broker was required only to obtain a certificate of qualification, § 10-103(c) (2000), but an agent was required to obtain both a certificate and "an appointment from an insurer." § 10-103(a) (2000). Howard Liebowitz obtained such an appointment. His "Individual Agent's Appointment Form," signed by an authorized representative of Valley Forge, states unequivocally that "We, hereby appoint the above named applicant to act as our agent in Maryland for the following insurer [i.e., Valley Forge]." Paper no. 31, Exh. 10. Furthermore, the version of § 10-103 in effect in 2000 stated that an agent with a certificate but without an appointment could only "submit to an insurer an informal inquiry" or "solicit an application" for insurance; without such appointment, to "take application" for insurance, as Howard Liebowitz did for his son, was forbidden. § 10-103(b) (2000).[3]

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[3] § 10-103(b) (2000) stated:

> (1) Except as otherwise provided in this subsection, an agent may not solicit, take application, negotiate, procure, or make any insurance for which the agent does not have an appointment.
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> (2) Without an appointment, an agent may:
>
> (i) submit to an insurer an informal inquiry for any kind of life insurance . . . for which the agent has a certificate of qualification if the

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Moreover, Howard Liebowitz's contract with Valley Forge echoes noticeably the language cited in *Goebel, supra*, to establish agency. *Compare* paper no. 31, Exh. 9 (stating that Howard Liebowitz was authorized "to solicit applications for policies . . . to collect the initial premiums . . . [and] to promptly deliver, in good order, to the policyholder, all policies, riders, endorsements and other forms . . . .") *with Goebel,* 96 A. at 630 (finding agency where agent's duty is "to take or solicit applications for insurance, to forward such applications to the insurer for acceptance, to deliver the policy and to collect the premium"). From all this, the court concludes that "but one inference can be drawn," *Globe Indem.,* 119 A.2d at 429, namely, that Howard Liebowitz was acting as Valley Forge's agent when he took his son's application for the policy.

Against these explicit manifestations of agency, Valley Forge argues that at the time he submitted his son's application to Valley Forge, Howard Liebowitz, like the independent

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insurer has a certificate of authority for the kind of insurance about which the inquiry is made; and

(ii) solicit an application for any kind of life insurance . . . for which the agent has a certificate of qualification if the insurer to which the application is submitted has a certificate of authority for the kind of insurance requested in the application.

solicitor in *Ricas,* solicited business for several different insurers and admits having considered "five or six" different companies' policies before recommending a Valley Forge policy to his son, paper no. 34, Exh. G, at 110, and was therefore the insured's broker. Even if true, however, that alone would not sever his explicit agency relationship with Valley Forge, for an insurance broker may be an agent of both parties at different points in the transaction. *Essex,* 168 F.Supp.2d at 558 (citing 3 Couch on Insurance § 45:3 (3rd ed. 1997)). Moreover, even if Howard Liebowitz were the insured's broker for the purpose of selecting a policy, that would not erase the implicit agency relationship established by Valley Forge's actions:

> [A] broker may act as an agent of the insured with respect to procuring insurance and then act as the insurer's agent for purposes of delivering the policy and collecting the premium. *Grain Dealers Mut. Ins. Co. v. Van Buskirk,* 241 Md. 58, 66, 215 A.2d 467 (1965); *Sun Ins. Office, Ltd. v. Mallick,* 160 Md. 71, 82, 153 A. 35 (1931). The rationale for this principle is that, even absent evidence of a consensual agency relationship between the insurer and the broker, the insurer, by sending the executed policy to the broker, has entrusted the broker with the delivery of the policy and the collection of the premium, thereby implicitly authorizing the broker to act on the insurer's behalf. *See* Barry S. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 18.02[c] (5th ed. 1992); 16 Appleman § 8731, at 373.

Commercial Union Ins. Co. v. Porter Hayden Co., 630 A.2d 261, 266-67 (Md. 1993), *vacated on other grounds,* 661 A.2d 691 (Md. 1995). Here, not only is there an explicit, consensual agency relationship between the insurer and Howard Liebowitz; there is implicit agency as well, for Valley Forge does not dispute that it mailed the executed policy to Howard Liebowitz, "thereby implicitly authorizing" him. At that point, if at none other, he became Valley Forge's agent, so his knowledge is imputed to Valley Forge.

B. Whether Valley Forge is Estopped From Denying Coverage

Because Howard Liebowitz's knowledge of his son's travel history is imputed to Valley Forge, Valley Forge is estopped from seeking rescission on the basis of that history. *See Arrigo,* 154 A. at 138; *Goebel,* 96 A. at 630; *Allstate,* 786 A.2d at 32. Valley Forge protests that estoppel cannot apply in this case because the use of estoppel requires that Valley Forge be "guilty of some unconscientious, inequitable, or fraudulent act of commission or omission, upon which another has relied," *N. Am. Specialty Ins. Co. v. Savage,* 977 F.Supp. 725, 735 (D.Md. 1997) (quoting *Bayshore Indus., Inc. v. Ziats,* 192 A.2d 487, 492 (Md. 1963)). It asserts that "Mrs. Liebowitz has offered no evidence that she or Mr. Liebowitz relied upon, or were misled by, any acts or omissions on the part of Valley Forge Life in

connection with Mr. Liebowitz's misrepresentations on his application," paper no. 34, at 10.[4] Plainly, however, the evidence offered by Ms. Liebowitz meets that standard. Valley Forge, knowing by imputation the decedent's travel history, was clearly "unconscientious" and "inequitable" in failing to inform the decedent that his life insurance policy was invalid from its inception. It is not disputed that the decedent and Ms. Liebowitz both believed he was covered under the policy, and relied on that belief. Estoppel therefore applies.

C. Whether Decedent Is Nonetheless Bound By the Misrepresentations on the Application

Valley Forge contends that the decedent's signature on the application is sufficient to render him responsible for the misrepresentation regardless of the agency status of the decedent's father, citing *Jackson v. Hartford Life & Annuity Ins. Co.,* 201 F.Supp.2d 506 (2002), and *Serdenes v. Aetna Life Ins. Co.,* 319 A.2d 858 (Md.Ct.Spec.App. 1974), which state that "an applicant for insurance is held to the representations in an application that he or she has signed, even if a third party

[4] The court is satisfied, Ms. Liebowitz's protest notwithstanding, that the threshold requirement cited in *Savage* applies; the standard, which Ms. Liebowitz asserts may be superceded because it "arises from a federal case [i.e., *Savage*] that was decided prior to the Court Of Special Appeals' decision in *Allstate*," in fact arises from *Bayshore,* the Maryland Court of Appeals case cited by *Savage,* and thus still controls.

fills out the application." *Jackson,* 201 F.Supp.2d at 511 (citing *Serdenes,* 319 A.2d at 863). The court finds two faults with this reading of *Jackson* and *Serdenes*.

First, these cases do not turn on the physical act of signing the application. The issue in both is the insured's awareness, or means to become aware, of the misrepresentation on the application. *Jackson,* citing *Serdenes,* continued:

> This holds true even if the third party deliberately inserts misleading or false information on the application form. If an application contains a false statement, it is immaterial that it is the agent who inserts false statements about material matters in an application for insurance, because if the assured has the means to ascertain that the application contains false statements, he is charged with the misrepresentations just as if he had actual knowledge of them and was a participant therein.

Jackson, 201 F.Supp.2d. at 511 (quotation marks and internal citations omitted). It is not the signature itself which is determinative, but the opportunity for inspection which it represents. *See Shepard v. Keystone Ins. Co.*, 743 F.Supp. 429, 432-33 (D.Md. 1990) (the question is "whether the insured had the means of knowing that false answers had been supplied"); *Foreman v. Western Reserve Life Assurance Co. of Ohio,* 716 F. Supp. 879, 883 (D.Md. 1989) (citing *Serdenes'* "means to ascertain" test and stating that "where the insured *has an*

opportunity to read over the policy before signing and then signs it, he represents that what has been recorded is true and is legally responsible for any material misrepresentations") (emphasis added). Reading these cases to dictate that the signature binds the signatory to the accuracy of all statements in a policy application would be contrary to Maryland's insurance statute, which states clearly that "each statement by or on behalf of the insured . . . in an application for [the issuance of a life insurance policy] is considered to be a representation and not a warranty." MD. CODE ANN., INS. 12-207(a). An applicant's signature is therefore better understood to be powerful evidence of having had an opportunity to review the application for correctness, but not a warranty itself binding the signatory to all the statements therein regardless of circumstance.

Second, irrespective of the signature issue, *Jackson and Serdenes* are inapposite here. In both cases, the insurer's agent was found to be unaware of the misrepresentation to which the insured's signature attested; here, by contrast, it is undisputed that the insurer's agent not only was aware of the misrepresentation, but arguably perpetrated it. Out of context, the *Jackson* language quoted above is overinclusive; it cannot be understood to apply even when the insurer knows, actually or by

imputation, of misrepresentations on an application. This limitation is, in fact, reflected in *Serdenes.* In that case, a policy application contained incorrect answers, and the applicant and agent disagreed as to whether the former provided accurate answers to the latter's questions. 319 A.2d at 860-61. That court made clear that the insurer's knowledge of misrepresentations would have sufficed to waive the insurer's right to rescind. *Id.* at 862. Finding the insurer to lack that knowledge, the court concluded:

> It cannot be said, therefore, that Aetna waived its right to rescind the policy simply because it accepted a second annual premium when it did so without either actual or constructive knowledge that the application upon which it had issued its policy contained material misrepresentations. *Absent a showing that Aetna knew that the answers given by Serdenes were false and, nevertheless, made payment on the policy,* it cannot be held to have waived its rights.

Id. (citing cases) (italics added).

More useful here is *Commercial Cas. Ins. Co. v. Schmidt,* 171 A. 725 (Md. 1934). In *Schmidt*, the insured's policy application for disability insurance incorrectly answered "no" to the question, "Have you been disabled by either accident or illness, or received medical or surgical attention during the last five years?" *Id.* at 727. The court found the question (and answer)

material to the insurer's decision to issue the policy. *Id.* at 728. As to why the incorrect answers were recorded on the application, the insured

> testified that he knew nothing of what answers were being written by the agent, that the agent was urging him to take the insurance, and filled in the application, and he merely told the agent of his physical troubles, according to the best of his ability, did not participate in any respect in making the false answers, and did not subsequently read them in the original application or in the policy. The agent, on the other hand, while admitting that he knew the falsity of some of the answers, . . . testified that he inserted them upon the urging of the plaintiff and the plaintiff's brother, because he knew the plaintiff would not get the policy if the correct statements were made, and the plaintiff and his brother argued that the company would know nothing about it, that they and the agent were friends, and urged that he should put down answers as the plaintiff gave them--"And I did the same, for which I was sorry afterward."

Id. at 727-28. The court, after finding the misrepresentation to be material and implicitly asserting that the person who took the application was an agent of the insurer, turned to the question of whether the insured or insurer would be held responsible. The court applied this test:

> If the plaintiff, having made all the disclosure demanded of him, has relied entirely on the agent to inform the insurer of the facts, the knowledge of those facts may be imputed to the insurer, and it may

> not be permitted to defend on the ground of the agent's fraud, *unless there has been participation in it* by the applicant.

Id. at 728 (emphasis added). In *Schmidt*, even on the facts as alleged by the insured, a fraud was being perpetrated where materiality was obvious and could not seriously be contested: The agent, in hopes of making his commission, was "urging him to take the insurance," *id.* at 727, despite knowing that the policy would not be issued if the correct answers were provided on the application. The court therefore found that, having had ample opportunity to discover that fraud by reviewing the application, the insured "was held to have become a participant by his neglect to perceive and correct the fraud." *Id.* at 729.

While similar, the facts of *Schmidt* are nonetheless distinguishable from the instant case. No one suggests Howard Liebowitz committed fraud in order to achieve a commission he would not otherwise get. He testified, and it has not been disputed, that he believed, given his knowledge of the underwriter's purpose for asking the question, that the misrepresentation was in fact the appropriate answer, though not the technically correct one. Even if the decedent had discovered the misrepresentation -- and there is no evidence that he did -- it is undisputed that he deferred to his father's understanding of the application, and that neither would have

changed the answer or thought to inform the insurer of its literal inaccuracy. Thus, he cannot be said to have "participat[ed] in" his agent's fraud. He is not, therefore, strictly bound to the misrepresentations on his policy application.

D. Whether the Decedent's Misrepresentation Was "Material"

When a misrepresentation on a policy application is alleged, Maryland courts engage in "a two-pronged inquiry to determine whether the insurer may validly rescind the policy. First, the Court must decide whether a misrepresentation occurred. . . . [Second], the Court must determine whether the misrepresentation was material to the risk assumed by the insurer." *Fitzgerald v. Franklin Life Ins. Co.,* 465 F.Supp. 527, 534-35 (D.Md. 1979) (citing cases); *see* MD. CODE ANN., INS. § 12-207(b). Here, the misrepresentation itself is conceded; even if the misrepresentation was material, however, knowledge of that misrepresentation is imputed to the insurer. *See supra* at II.A. Materiality is therefore moot.

E. Whether the Decedent Failed to Satisfy a Condition Precedent

Finally, Valley Forge contends that the decedent's misrepresentation constitutes a failure to satisfy a condition

precedent of the policy. The policy application states that "if no premium has been given to the agent with the application, insurance will not take effect until . . . the policy is delivered while the health of each person proposed for insurance and other conditions remain as described in this application and at least the first premium . . . has been paid in full." Paper no. 36, Exh. A, at 2. The first premium was not paid until October 16, 2000, three months after the decedent's application for coverage was submitted to Valley Forge. Valley Forge therefore argues that the decedent's travel after his application was submitted in July, but prior to the policy's issuance in October, constituted "a change in the conditions as described in the application, i.e., whether he had traveled outside the United States." Paper no. 34, at 9.

This argument is unavailing. As explained *supra* at III.A, knowledge of the misrepresentation is imputed to Valley Forge, and therefore "will not be permitted to defeat recovery on the ground that the conditions thus stipulated did not exist." *Allstate,* 786 A.2d at 32.

For the reasons stated above, the court will deny Valley Forge's motion; grant Ms. Liebowitz's motion; declare that Valley Forge Life Insurance Policy No. AUTU000676 is valid and

enforceable, and that Valley Forge has breached its obligation to pay the death benefit thereunder; and award compensatory damages of $2,000,000.

IV. Pre-Judgment Interest

Maryland Insurance Code states that, subject to exceptions inapplicable here, "interest on benefits payable under a policy of life insurance issued in the State accrues and is payable from the date of death of the insured to the date the proceeds of the policy are paid." MD. CODE ANN., INS. § 16-109(a). The court therefore awards prejudgment interest accruing from September 5, 2002, the date the decedent died. The prejudgment interest will accrue at a rate of 6%, Maryland's legal rate of prejudgment interest. *Fed. Sav. & Loan Ins. Corp. v. Quality Inns, Inc.,* 876 F.2d 353, 359 (4th Cir. 1989); *see* MD. CONST. ART. 3, § 57 ("The Legal Rate of Interest shall be Six per cent. per annum; unless otherwise provided by the General Assembly.").[5]

[5] The court notes that § 16-109(c) states that the interest "accrues and is payable at a rate not less than the rate of interest payable on death proceeds left on deposit with the insurer," and that the decedent's policy states that its interest rate for such payments is 3%, compounded annually. Paper no. 36, Exh. B, § 4.24. That rate, however, is the minimum rate, not the required rate in all cases, so the court is not bound to apply it when it is lower than Maryland's constitutionally provided rate.

Inasmuch as there are other issues to be resolved, the amount of prejudgment interest cannot now be calculated.

A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

March 15, 2005